

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

**IN RE: VALSARTAN PRODUCTS
LIABILITY LITIGATION**

CIVIL ACTION NUMBER:

19-md-02875-RBK-TIV

CASE MANAGEMENT CONFERENCE

Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets
Camden, New Jersey 08101
Wednesday, June 7, 2023
Commencing at 1:16 p.m.

B E F O R E:

**THE HONORABLE ROBERT B. KUGLER,
UNITED STATES DISTRICT JUDGE**

**THE HONORABLE THOMAS I. VANASKIE (Ret.),
UNITED STATES SPECIAL MASTER**

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ALSO PRESENT :

LORETTA SMITH, ESQUIRE
Judicial Law Clerk to The Honorable Robert B. Kugler

Larry MacStravic, Courtroom Deputy

1 (PROCEEDINGS held in open court before The Honorable
2 Robert B. Kugler and The Honorable Thomas I. Vanaskie, (Ret.)
3 District Judge, at 1:16 p.m.)

4 THE COURTROOM DEPUTY: All rise.

5 JUDGE KUGLER: Thanks. Have a seat, everybody. Come
6 back to Camden, don't mind the smoke. The earth is burning
7 apparently. I don't know.

8 All right. I believe we want to start, Mr. Slater has
9 asked for a few minutes to bring up a new matter, so we'll
10 start with you, Mr. Slater.

11 MR. SLATER: Thank you, Your Honor. I'm pleased to
12 announce that the plaintiffs and the Hetero defendants have
13 reached a settlement in principle of the Valsartan economic
14 loss claims, Valsartan medical monitoring claims, Valsartan
15 personal injury claims with regards to the contaminated
16 Valsartan, which was on the market for approximately two
17 months; and the Losartan medical monitoring and Losartan
18 personal injury claims.

19 We're still working on just papering the agreement,
20 but we have reached agreement in principle on material terms
21 and there's a few other issues that we're going have to tie up.

22 And the only thing I'll announce, just for the benefit
23 of anyone in the court, is that as to the personal injury
24 settlements, the eligibility cutoff to participate was
25 yesterday at 9:00 a.m. for a case to either have been filed or

1 placed on the census that we've been maintaining as a
2 plaintiffs' steering committee.

3 So beyond that, there's really nothing else for me to
4 say, but I thought that it was very important for the Court and
5 the other participants in litigation to know that that's
6 happened, we've reached that point; and to the extent that it
7 impacts any of the arguments today, that information is out
8 there for people participating.

9 JUDGE KUGLER: All right. Thank you.

10 MR. SLATER: Thank you.

11 JUDGE KUGLER: There's a number of matters that we
12 want to discuss on your agendas. Let's start with the easy
13 stuff, which is the deficiencies and the pending orders to show
14 cause.

15 MR. HARKINS: Good afternoon, Your Honor. Steve
16 Harkins with Greenberg Traurig for the joint defense group.

17 JUDGE KUGLER: Apparently the Bixler and Jiles,
18 J-I-L-E-S, matters have been resolved; is that correct?

19 MR. HARKINS: That's correct, Your Honor.

20 JUDGE KUGLER: We'll dismiss the order to show cause
21 on that.

22 And the Hardwick case you want another month; is that
23 correct?

24 MR. HARKINS: That's correct, Your Honor. We'd ask
25 that that be continued to the next case management conference.

1 JUDGE KUGLER: All right. We'll continue the Hardwick
2 until the next month's meeting.

3 Then we have five cases you want to list for an order
4 to show cause. Any changes in that?

5 MR. HARKINS: One update, Your Honor. Number 4 on the
6 list, Thomas Fogarty, that has resolved and the request for an
7 order to show cause can be withdrawn. And we would ask for
8 orders to show cause returnable at the next case management
9 conference in the other four cases.

10 JUDGE KUGLER: Anybody here on the matter of Ricky
11 Young that want to be heard?

12 (No response.)

13 JUDGE KUGLER: How about Jacquelyn Smason,
14 S-M-A-S-O-N, anybody want to be heard on that?

15 (No response.)

16 JUDGE KUGLER: Rafael Feria, F-E-R-I-A, anyone want to
17 be heard on that matter?

18 (No response.)

19 JUDGE KUGLER: And Robert Janecek, J-A-N-E-C-E-K,
20 anyone want to be heard on that matter?

21 (No response.)

22 JUDGE KUGLER: All right. They will be listed for
23 orders to show cause why they shouldn't be dismissed,
24 returnable at the next meeting.

25 And then you have 31 you want to list. Any changes on

1 that?

2 MR. HARKINS: That's correct, Your Honor, and no
3 changes. These cases are being listed for the first time, so
4 we'll simply list them again on the next agenda going forward.

5 JUDGE KUGLER: Michael Goss, G-O-S-S.

6 (No response.)

7 JUDGE KUGLER: Cynthia Earney, E-A-R-N-E-Y.

8 (No response.)

9 JUDGE KUGLER: Regina Johnson.

10 (No response.)

11 JUDGE KUGLER: Leslie Sturgill, S-T-U-R-G-I-L-L.

12 (No response.)

13 JUDGE KUGLER: Russell Christian.

14 (No response.)

15 JUDGE KUGLER: Taffnie, T-A-F-F-N-I-E, Williams.

16 (No response.)

17 JUDGE KUGLER: The Estate of John Faragi, F-A-R-A-G-I.

18 (No response.)

19 JUDGE KUGLER: Richard Parks.

20 (No response.)

21 JUDGE KUGLER: George Cook.

22 (No response.)

23 JUDGE KUGLER: Lawrence Addison.

24 (No response.)

25 JUDGE KUGLER: Sharon Thomas.

1 (No response.)
2 JUDGE KUGLER: Joseph George.
3 (No response.)
4 JUDGE KUGLER: Michelle Worms.
5 (No response.)
6 JUDGE KUGLER: Robert Lee.
7 (No response.)
8 JUDGE KUGLER: Karl Bartels, B-A-R-T-E-L-S.
9 (No response.)
10 JUDGE KUGLER: Seifert, S-E-I-F-E-R-T.
11 (No response.)
12 JUDGE KUGLER: Tom Lemen, L-E-M-E-N.
13 (No response.)
14 JUDGE KUGLER: James Magee.
15 (No response.)
16 JUDGE KUGLER: Phyllis Axt, A-X-T.
17 (No response.)
18 JUDGE KUGLER: William Garewal, G-A-R-E-W-A-L.
19 (No response.)
20 JUDGE KUGLER: Beatrice Meza, M-E-Z-A.
21 (No response.)
22 JUDGE KUGLER: Jane Davis.
23 (No response.)
24 JUDGE KUGLER: Stacey Thomas.
25 (No response.)

1 JUDGE KUGLER: Arnold Vander.

2 (No response.)

3 JUDGE KUGLER: Estate of Barbara Lipscomb.

4 (No response.)

5 JUDGE KUGLER: Benjamin Andrews.

6 (No response.)

7 JUDGE KUGLER: James Polk.

8 (No response.)

9 JUDGE KUGLER: Phillip Quinn.

10 (No response.)

11 JUDGE KUGLER: Estate of Tina Schram, S-C-H-R-A-M.

12 (No response.)

13 JUDGE KUGLER: Boyko, B-O-Y-K-O; Achkova,

14 A-C-H-K-O-V-A.

15 (No response.)

16 JUDGE KUGLER: And Dean Tasman, T-A-S-M-A-N.

17 (No response.)

18 JUDGE KUGLER: Having heard no objection, they will be
19 relisted for the next meeting.

20 MR. HARKINS: Thank you, Your Honor.

21 JUDGE KUGLER: Thank you, sir.

22 All right. The class notice proposal in this matter,
23 I'm not sure I understand why there's such a dispute about
24 this, to be honest with you. Apparently you want more time to
25 brief this; is that right, everybody wants more time?

1 MR. OSTFELD: Your Honor, Greg Ostfeld on behalf of
2 Teva. Your Honor, plaintiffs have filed an initial class
3 notice proposal, we filed an opposition. It's my understanding
4 that plaintiffs are -- haven taken consideration our
5 opposition, wish to revise their class notice proposal, so I
6 believe what they need is time to develop their revised class
7 notice proposal, and then we just set a briefing schedule on
8 the revised proposal.

9 JUDGE KUGLER: I'm not sure why this is that
10 complicated that we need all this briefing done. I mean, the
11 class notice just has to be reasonably designed to reach the
12 maximum number of potential parties under the circumstances.
13 And we can't get perfection obviously, so I'm not sure why we
14 can't just sit down the two sides across the table and work
15 this out? This is not the first time there's been class
16 notices sent out.

17 MR. PAREKH: Your Honor, we think we can resolve most
18 of --

19 (Court reporter interruption.)

20 JUDGE KUGLER: Your name, please.

21 MR. PAREKH: Oh, I'm sorry. Behram Parekh on behalf
22 of plaintiffs.

23 JUDGE KUGLER: Thank you.

24 MR. PAREKH: We believe we can probably work out all
25 of this in a relatively short period of time and present any

1 proposal. The main wrinkle at this point is because of the
2 Hetero settlement, our idea would be to combine notice for both
3 settlement purposes and for the class purposes, and so we need
4 to work out the details of that and -- you know, so to try and
5 minimize cost to the class. And so it's just a matter of
6 getting all of our ducks in a row for that.

7 JUDGE KUGLER: I just don't want this to drag out into
8 the fall.

9 MR. PAREKH: Absolutely not, Your Honor.

10 JUDGE KUGLER: I want to move this thing along now.

11 MR. PAREKH: Absolutely.

12 JUDGE KUGLER: All right. Well, I'm hoping then at
13 the next meeting you'll have news that you've got this
14 resolved. If that means you have to sit down with each other
15 and talk to each other, I want you to do it, okay. I want you
16 to get this done.

17 MR. PAREKH: That's our goal.

18 JUDGE KUGLER: All right?

19 MR. PAREKH: Thank you, Your Honor.

20 JUDGE KUGLER: All right. You have some issues about
21 Case Management Order 32, correct? That's why Judge Vanaskie
22 is here?

23 MR. STANOCH: Yes, Your Honor. David Stanoch for the
24 plaintiffs. There will be some issues that we're still
25 negotiating with the retailers, that if there's any lingering

1 impasse, we'll submit them to Special Master Vanaskie next
2 week, but there's three issues we wanted to raise today.

3 One is the issue of telephone numbers. And I'm hoping
4 this isn't rocket science for the Court or anyone else.
5 Retailers have agreed to produce the names, addresses, and if
6 available in their pharmacy dispensing records, emails for the
7 consumer class members.

8 After we reached that agreement, we got the
9 defendants' opposition to our notice plan. There was a lot of
10 emphasis on direct notice. We went back within 24 hours of the
11 HIPAA order that the retailers wanted to say we should add a
12 telephone number. It's a readily identifiable data point that
13 will allow more effectively and less expensively contact to
14 class members. We get -- everyone gets texts all the time.
15 It's in the same database they're going to.

16 JUDGE KUGLER: That's the proposal, you're going to
17 text or robocall all of these people?

18 MR. STANOCH: It will be part of the revised plan,
19 will be a proposal. Probably text, Your Honor, but the final
20 decision has not been made yet.

21 JUDGE KUGLER: Just because it's very cost effective?

22 MR. STANOCH: Two reasons. One is it's cost effective
23 and will save the class a substantial amount of money. Even at
24 the cheapest postage rates, we're talking about millions of
25 people getting a postcard, which, you know, we all get

1 postcards in the mail, Judge; and then number two is, we've
2 been told by retailers that they don't believe they will have
3 many email addresses for consumers in their pharmacy database.

4 But we have reason to believe they'll certainly have
5 many more phone numbers because we all get texts from our
6 pharmacies all the time. I got one yesterday from CVS for
7 myself at 5:47 p.m. that I have a prescription that's still
8 sitting there.

9 So yes, we think that -- given that they have the
10 data, it would be efficient for the class on expenses. They're
11 going to the database anyway for the names, addresses, and
12 birth dates for claims eligibility. That makes sense just to
13 pull just this one additional data point at this time.

14 JUDGE KUGLER: But apparently we can't get agreement
15 from the defense side; is that correct?

16 MS. KAPKE: Kara Kapke for the pharmacy defendants,
17 Your Honor.

18 We got this request last week and, honestly, it's not
19 an issue of burden, it's an issue of what the notice plan is
20 going to use these for. We do have some privacy concerns. I
21 think with this particular class, text messages may be an
22 intrusion of privacy, but ultimately I think that's up to the
23 Court. And if the Court thinks that under HIPAA providing
24 telephone numbers is the minimum necessary disclosure for the
25 purposes of litigation, I think we can probably go ahead and

1 provide them if that's the guidance we're getting from the
2 Court.

3 We haven't seen the notice plan. I certainly do think
4 that, you know, robocalls would be very intrusive, particularly
5 for this elderly population. I don't know that this population
6 of people is actually going to get text messages. I don't
7 know. I haven't seen the notice plan, I don't know what the
8 numbers are.

9 But in terms of what we're willing to do, if the Court
10 thinks that this is truly compliant under HIPAA and this is the
11 minimum necessary disclosure to protect the class members'
12 privacy interest, I think the pharmacy defendants are willing
13 to do this.

14 JUDGE KUGLER: What do you think the privacy interests
15 are?

16 MS. KAPKE: Well, this is protected health
17 information. It's -- you know, there is a privacy interest in
18 getting a phone call or a text message that is not necessarily
19 tied to the individual who received the prescription. It's
20 also possible that these phone numbers are not linked to the
21 actual consumer who received the medication. You know, these
22 are 12-year-old pharmacy records in some instances, and so it's
23 possible that some of those numbers, those telephone numbers
24 have been relinquished, it's possible that they've been -- the
25 person is deceased. It's really -- I think it's up to the

1 Court to articulate if this is going to be part of the notice
2 plan. And if it is and if there's not a finding that this
3 is -- if the Court thinks that this is necessary, we'll provide
4 it.

5 JUDGE KUGLER: Well, almost by definition the phone
6 numbers are tied to people who have a prescription relationship
7 with the pharmacies, right?

8 MS. KAPKE: As long as that phone number doesn't go to
9 a person who has since passed away or they've relinquished
10 their phone number, I think you're right, Your Honor. Because
11 we're talking about phone numbers in the dispensing data.

12 So, you know, as long as there is some proposal on
13 plaintiffs' part to figure out how to make sure that those
14 numbers aren't part of a relinquishment or some other plan to
15 go through and make sure that those numbers actually have
16 stayed the same, which I think that they can do, I think we're
17 okay with doing this.

18 But we got this request last week and we haven't
19 talked to our clients. Our clients do have, you know, privacy
20 concerns. They're very protective of their protected health
21 information. You know, they don't like to get calls from their
22 customers saying why did you give out my phone number and why
23 am I getting all these spam calls.

24 We don't know what the notice plan is going to say. I
25 think if they robocalled everyone every night for two weeks,

1 that would be very intrusive. So it depends on what they do,
2 and we just don't know what it is.

3 JUDGE KUGLER: I can't imagine they're going to
4 robocall everyone for two weeks every night. I just --

5 MS. KAPKE: I hope not. Although, I don't know.

6 JUDGE KUGLER: Well, they're not going to, I can tell
7 you that, okay. That isn't going to happen.

8 MR. STANOCH: Judge, I'm looking at Mr. Slater, but I
9 think we'd even stipulate to that right now, that we will not
10 robocall all of these people every day for six weeks.

11 JUDGE KUGLER: Well, it sounds like you're really not
12 that far apart. Judge Vanaskie will enter whatever order you
13 need.

14 MR. STANOCH: Thank you, Judge.

15 JUDGE VANASKIE: You need to amend the HIPAA order?

16 MR. STANOCH: Yes.

17 MS. KAPKE: Yes.

18 JUDGE VANASKIE: Okay.

19 MR. STANOCH: Just two other items that we were hoping
20 to address today in this similar vein. One is the third-party
21 payer identities. There's no dispute with the retailers that
22 they're going to be producing something later about the amounts
23 paid that was ordered in CMO 302, but now we're on this topic
24 of notice. And again, it came up when we got the opposition
25 from defendants about the prognostications about direct notice.

1 And he said, okay, well, we have party defendants, eight or
2 nine of them, who have the names or codes for entities where
3 they're intermediaries, the reported payers, give that to us
4 now too. You're giving us the consumer names, addresses,
5 emails, and hopefully telephone numbers. At the same time
6 you're doing that data pull, just give us the TPP insurer plan
7 paid name, we'll figured the dollars later, but give us these
8 names so we can include it in our revised plan. It doesn't
9 have to be perfect, but this is another sort of information of
10 TPP class member.

11 So we would like to include that information in this
12 first-wave date pull so we get as much possible to have a
13 robust notice program.

14 JUDGE KUGLER: You want to speak on that, please?

15 MS. KAPKE: Yes, Your Honor. Again, Kara Kapke.

16 I just want to say, we're not party defendants in the
17 TPP class. I think that's worth mentioning. And I also think
18 it's worth mentioning that this is not really something that
19 can be said in response to the opposition to class notice
20 because what we're talking about is in the class notice plan
21 for the TPPs, plaintiffs proposed using a list that they
22 purchased from an outside vendor that consisted entirely of
23 pharmacies and didn't contain a single TPP.

24 That was their proposal to provide notice to TPPs. It
25 wasn't a matter of direct notice. They were planning on giving

1 direct notice to these individuals who weren't themselves TPPs.
2 In fact, they were often employees of the pharmacy defendants.
3 There was a certified line specialist on that list. It had no
4 relationships to TPPs themselves.

5 In terms of what we're being asked to do, I think it
6 boils down to what's in the data. The examples that plaintiff
7 gave reflected two examples. One from Cosco, which is not a
8 defendant, and the redacted information for the TPP plan was
9 just a numerical code, 4005; the other one had some letters
10 that, frankly, mean nothing to me, HNBND. I don't know what
11 those numbers mean. I don't know how plaintiffs can take
12 that and convert them into some sort of identification of a
13 TPP.

14 You know, if they want us to do that -- we haven't had
15 a chance to talk to our clients about what that is, what that
16 means. We got this request on Friday. But I think our bigger
17 concern is the secondary request that we're getting from
18 plaintiffs to give us the code to this, because I don't think
19 we have the code. Again, we got this request on Friday, so I'm
20 not -- you know, everything I say is a little bit preliminary
21 here.

22 But from my understanding, our clients are not all
23 going to have any type of information that can make sense of
24 this. That's a code that is used by other intermediaries. So
25 I don't know what plaintiffs are going to do with this

1 information necessarily, and so I think it behooves us to say
2 that, you know, these new requests are something we really
3 haven't had a chance to investigate and the data is the
4 data.

5 And if all we're asking -- if all of the plaintiffs
6 are asking us to do is to provide some code that we don't know
7 what means and they can make sense of, then, you know, we might
8 be able to reach an agreement on that. We need to run that by
9 our clients. But I think we might be able to reach an
10 agreement on it. It's the secondary comments in the letter
11 that gives us a little bit of a pause.

12 And separately, we have heard some concern from some
13 pharmacy defendants that there may be some contractual
14 restrictions about producing this en masse. I don't know if
15 that's an issue here. But if there is an identification of a
16 plan or a PBM or some type of thing and we disclose that en
17 masse, I don't know if there are contractual limitations such
18 that we have to provide notice. That's something we need to
19 investigate before we can just readily agree to produce this.
20 We're certainly willing to do this.

21 And I think what I would propose as the next step on
22 this, finish running this down and if, you know, Mr. Stanoch
23 and the pharmacy defendants cannot work something out, we can
24 brief it in our next briefing submission to Special Master
25 Vanaskie, but I think we might be able to work something out

1 here.

2 JUDGE KUGLER: Judge Vanaskie, how do you want to
3 proceed on that?

4 JUDGE VANASKIE: Well, I think I'd like you to see if
5 you can figure a way to work this out, and if not, then include
6 it in the briefing.

7 Does that pose a timing problem from the plaintiffs'
8 perspective with respect to class notification?

9 MR. STANOCH: No, Your Honor.

10 JUDGE VANASKIE: Okay. Then let's handle it on that
11 basis.

12 MR. STANOCH: Very good, Your Honor.

13 MS. KAPKE: Thank you.

14 MR. STANOCH: And the last scintillating data issue is
15 about again the retailers. And I'm sorry to pick on the
16 retailer, but they're the ones who have the data in these
17 instances.

18 We've been talking about their pharmacy dispensing
19 database. That's the one when you go to the pharmacy counter
20 and you get a drug, they scan your card, et cetera.

21 We believe they also have additional customer
22 databases, loyalty program, rewards program, membership
23 program, what have you. We've been told by them that they
24 think they do not have many emails in their pharmacy dispensing
25 data. And again, email is important because it's a form of

1 direct notice and we'll save a lot of money for the class.

2 Our proposal was that -- once we heard this, is how
3 about your other databases, the ones I listed? Go get the
4 emails for these folks from there so we could use that as well.
5 You have those emails. There's other cases that you've been
6 ordered as third parties to produce it, you should produce it
7 here.

8 And their response is -- I won't rephrase it, but just
9 as is in their letter, that there's issues of searching and
10 things of that nature. But we think that this should be
11 ordered ahead of the revised notice program because, again,
12 this will be information to address defendants own concerns to
13 have a robust notice program, we should get these contact
14 information and other databases to include in it.

15 JUDGE VANASKIE: Well, what's the burden to search
16 these other databases?

17 MS. RICHER: Your Honor, the burden is quite
18 substantial actually. So I want to flag -- sorry, Kristen
19 Richer, Your Honor.

20 This came up in the -- again recently, we're still
21 investigating, but we have done as best we could to track down
22 information to answer that question for Your Honor because we
23 knew you would be asking about that today.

24 You know, first I'll just flag that this is largely
25 duplicative information of the information that's coming from

1 the dispensing records, and I think that's part of the concern,
2 although not the entire concern.

3 But frankly, Your Honor, when it comes to actually
4 running these kinds of searches and the way that plaintiffs are
5 contemplating and given what this litigation is about, these
6 are difficult, costly, and, frankly, unreliable searches to
7 run.

8 Here we have prescription drugs that are at issue, so
9 we're not talking about front-of-store, over-the-counter
10 product, which is the example that was given to us by
11 plaintiffs' counsel when they mentioned that you had done this
12 in other litigations. It was referenced to the Zantac
13 litigation, as I understand it, which those loyalty searches
14 really concerned over-the-counter Ranitidine that was sold not
15 by -- not behind the counter, not by the pharmacist.

16 For prescription drugs, a pharmacy's dispensing
17 records and patient profiles are the one true source of
18 accurate information about the patient filling their
19 prescription, it's how the pharmacy figures out who has filled
20 what, and it's how the pharmacy knows how to contact people.
21 And so if what we're talking about is accuracy in identifying
22 class members, the dispensing data that we're already searching
23 under the HIPAA order, that's the source for that information.

24 When we're talking about loyalty data, there are a
25 number of problems. And I'll just run through some of them for

1 Your Honor. This is somewhat general because we've talked to
2 numerous clients and tried to pull together what we could for
3 this. Very often loyalty reward information, the sorts of
4 loyalty identifiers that plaintiffs are seeking or that we
5 would need to run these searches is not linked to a customer's
6 pharmacy profile. They aren't required to use that number to
7 purchase things from the pharmacy and often -- unless they're
8 making front-of-store purchases at the same time, there's no
9 need for them to do so.

10 Some pharmacy systems don't have the ability to put
11 that information in at all, and for others what we're told is
12 it's very inconsistent whether the loyalty reward number is in
13 the pharmacy dispensing data.

14 For most pharmacies, loyalty rewards records generally
15 are not searchable by NDC, so the pharmacies can't run, for
16 example, an all-customer query for loyalty records to identify
17 who filled the NDCs at issue in this case. That's just not how
18 the system is programmed.

19 They have to be searched on a consumer-specific basis,
20 which is troubling because we're not talking about a cluster of
21 unfiled personal injury claims here where plaintiff's counsel
22 is identifying people for us; we're talking about a class of, I
23 think Mr. Stanoch said earlier, millions and millions of
24 consumers. So if we're the ones who are having to put the data
25 in to find these people's patient profiles, it becomes a lot of

1 searching.

2 In some instances those searches cannot be run en
3 masse. So they have to be run either individually, customer by
4 customer, which many of the pharmacies had to go through the
5 expense of doing in Zantac and we're told that it was quite
6 burdensome and time consuming.

7 (Court reporter interruption.)

8 MS. RICHER: In some instances the clients may be able
9 to search in batches, but there's a real concern about how big
10 that batch is and whether it can basically lock out the system
11 or cause problems. So again, millions and millions of
12 consumers, we're not sure that it's even feasible to search
13 that way.

14 We generally need the consumer's information, two to
15 three identifiers to run these searches, and the results have
16 to be QCed because you end up with false hits, duplicative
17 profiles, weird stuff that comes back in and someone has to
18 mine through that data. Again, with millions and millions of
19 consumers, you can imagine the time and expense there.

20 And the really tricky part is the identifier that you
21 really need is the loyalty number. That's the best way to run
22 the search if you're going to do it. But again, that's
23 generally not in the dispensing data. Names can yield false
24 hits, DOBs often -- dates of birth often aren't entered because
25 you don't need to enter your date of birth to set up a loyalty

1 account. That's actually true to email addresses themselves,
2 Your Honor. Like, not everyone puts their email address in.
3 Addresses can yield false hits and people don't always put
4 their full address information in.

5 So what you need is a loyalty number, which is the
6 thing we don't have, and this isn't a circumstance where
7 plaintiffs' counsel is giving us the loyalty numbers. We're
8 being told take this list of millions and millions of people
9 who filled out your pharmacies and go run these searches. All
10 in all, we're not sure that this is even feasible.

11 It may -- to even try to do it, we would need to first
12 have the dispensing data that we're already pulling, which is
13 going to take some amount of time, as we told the Court, and
14 then we'd need to figure out if there's some way that we can
15 piece together information to query one or multiple databases
16 to look for emails.

17 And I think our real concern here is that that's all
18 being -- Judge Kugler, you said it earlier, there's no
19 100 percent perfect outcome when you're trying to identify
20 people for class notice purposes, but that's sort of what
21 plaintiffs are asking us to do here as we understand the
22 letter. They're saying search all the databases where you
23 might have consumer's information, search all of those using
24 this huge data set of millions and millions of consumers, and
25 give us the stuff that's in there in case we need another way

1 to contact these people.

2 It may not be feasible, it would take an extraordinary
3 amount of time if it is feasible, and it certainly is very,
4 very burdensome. So for those reasons, you know, we -- we're
5 still investigating this, but I can tell you that early
6 investigations suggest what we already told Mr. Stanoch, which
7 is that this is not something that's workable and we don't
8 think we should have to do it.

9 JUDGE VANASKIE: Mr. Stanoch?

10 MR. STANOCH: I won't get into the nitty-gritty, Your
11 Honor, and if you think this is something you want to hear more
12 on, later we would be happy to do it. I would just say, I
13 heard a lot of "ifs," Your Honor. If the data is inconsistent,
14 if we can't do this, if we can't do that, if it might not be
15 perfect. That's not our touchstone here.

16 Defendants in their opposition to class notice said
17 you have to take reasonable efforts to do direct notice. We
18 have party defendants who have emails that will give us direct
19 notice, they're just in a different database. If the answer --
20 to address their concerns, that's the data we would use, one of
21 the multiple sets, to address that concern.

22 If they're going to say it's unreasonable and
23 burdensome, then they can't turn around and then say our class
24 notice program is insufficient for that reason.

25 And I'd also just say it's not just Zantac, Your

1 Honor. There's multiple cases -- and I won't list them all
2 now -- these very same defendants, retailers, have produced as
3 third parties this same information from these systems before.
4 This isn't something new. There's -- we can cite case after
5 case from Brooklyn to Washington to Kansas to Arkansas and
6 everywhere in between where we're finding that this information
7 is being provided for purposes of notice specifically from
8 retailers such as Wal-Mart, CVS, Target, even though it's not a
9 defendant, and others.

10 JUDGE VANASKIE: The premise for the request is the
11 understanding or view that the information in the dispensing
12 databases will not have email addresses, you'll get it from a
13 different database?

14 MR. STANOCH: That's right, Your Honor.

15 And I'm sure Ms. Richer or Ms. Kapke will correct me
16 if I'm wrong, but they've suggested to us that in the ordinary
17 course not all and probably many of the retailers pharmacy
18 dispensing databases maintain email.

19 And we put a few samples from our clients on records
20 in our letters to show -- you know, it doesn't show email
21 fields. So we're worried that the pharmacy data, even though
22 they've agreed to produce email to the extent it exists in the
23 pharmacy dispensing records, that's going to be very
24 underinclusive.

25 MS. RICHER: And, Your Honor, if I could just respond

1 to Mr. Stanoch's points just now?

2 JUDGE VANASKIE: You may.

3 MS. RICHER: So I just want to flag -- you know,
4 Mr. Stanoch has come back to the notice plan and to the
5 defendants' objections to the originally filed notice plan. I
6 think we just have to flag that there's a huge delta between
7 what was originally proposed in that plan, which contemplated
8 no direct notice to consumers at all, essentially using social
9 media and pushed advertising to get to consumers, versus what
10 they're getting now and what they're contemplating using, which
11 includes from the dispensing data the one true source, names,
12 addresses, dates of birth, phone numbers, if the Court orders
13 it -- and it sounds like we may be able to get there
14 with plaintiffs -- and email addresses if they're available.
15 That's drastically different than what was originally proposed.

16 So this -- the hand-wringing about, well, they
17 objected before so now we need them to take a scorched-earth
18 approach to find every possible contact point, to me that
19 shouldn't really carry the weight that the plaintiffs are
20 trying to put on it.

21 The other thing I do want to say is Mr. Stanoch hasn't
22 sent me the cases he has in front of him. There's a huge
23 difference between the ability to search in some instances for
24 front-of-store products in someone's loyalty records and to use
25 that to pull together a dataset of people who use their loyalty

1 numbers to purchase those products, versus searching
2 back-of-store or pharmacy fills in loyalty products. Because
3 like I said, those are not always linked accounts.

4 And even where a pharmacy purchase shows up in the
5 dispensing data, what we've heard from numerous clients is it
6 won't show up at -- you won't get the NDC information. So it
7 may say that something was filled, but you won't know that it
8 was an admin issue NDC.

9 JUDGE VANASKIE: Well, I suppose I should ask you to
10 submit some letter briefs on this issue. I'd hate to make that
11 suggestion, but there's a -- you've referenced you've got
12 plenty of case law that says this data is routinely provided in
13 these types of matters, and opposing counsel has said not
14 familiar with that case law, that this is distinguishable.

15 I can certainly understand why it would be viewed as
16 distinguishable. I can certainly understand the burden that
17 would be imposed to provide this information. Perfect notice
18 or notice system designed for perfection is impossible.

19 So it seems to me that maybe it's a bit of an
20 overreaction on the part of the plaintiffs, the objections to
21 the original notice plan to now be seeking all this
22 information, but why don't you submit it in letter briefs and
23 we'll get it resolved as promptly as possible.

24 MR. STANOCH: Yes, Your Honor. Thank you.

25 MS. RICHER: Your Honor, may I just raise one concern

1 about letter briefing on this?

2 JUDGE VANASKIE: Yes.

3 MS. RICHER: So as originally contemplated when we
4 submitted the proposed schedule for briefing to Your Honor, we
5 have briefs due next Tuesday, our opening briefs. I have some
6 concern that we're not exactly sure, based on plaintiffs'
7 letter, about what it is that they're asking, and we're still
8 trying to pin down some information from our clients.

9 So I'm a little bit worried that for this specific
10 issue that deadline is a little short on our end and that we
11 may need a slightly pushed-out briefing schedule on this. I
12 certainly could brief for Your Honor everything that I just
13 talked about so that you have it in front of you. And I would
14 really appreciate seeing Mr. Stanoch's cases that he's citing
15 because I think if there's room to meet and confer on this,
16 fine, let's meet and confer. We have a call set for Friday,
17 maybe we'll talk about it then.

18 But if Your Honor is going to want something more from
19 us on burden, like affidavits, for example, I think that's not
20 realistic on this timeline and so we're really looking for the
21 Court's guidance on that. We're not trying to delay getting to
22 this, just the way that the issue has come up has left us with
23 very little time to actually get things ready for that opening
24 brief if this is something that's going to end up...

25 JUDGE VANASKIE: Mr. Stanoch?

1 MR. STANOCH: We prefer to keep the original schedule
2 as-is, Your Honor, given how many other sensitive deadlines
3 there are. And I would suggest that if Your Honor believes
4 there's more than whatever initial submission retailers submit,
5 they have time to do a reply already in the existing schedule
6 by the end of June, before the July 6th, I believe, hearing.
7 And they could supplement it and we will not object if they
8 come up with a burden affidavit at that reply because they
9 don't have time to get it in time for next week with their
10 opening submission.

11 JUDGE VANASKIE: I think that would be sufficient.
12 And so your burden affidavit could come in with your reply.

13 MS. RICHER: Understood, Your Honor.

14 Could I just make one more point here, because I think
15 it's relevant to our discussion about timing and I don't want
16 it --

17 JUDGE VANASKIE: Yes.

18 MS. RICHER: Because this is duplicative information
19 or largely duplicative information, as we understand it, I
20 don't think we view that whatever happens with this -- I mean,
21 we mentioned this in our letter. This is premature in many
22 ways. I don't think we think it needs to interfere with what's
23 happening on the HIPAA order data pull. Certainly if this data
24 were also eventually -- if we're told to pull this data,
25 eventually we would need some sort of order that governed that

1 and directed us to do it.

2 But I think that -- you know, plaintiffs are concerned
3 about class notice and needing to get this resolved as quickly
4 as possible. This seems to be a very complicated issue. And
5 Ms. Kapke and I are both of the view that we're going to be
6 moving forward on the HIPAA data pull no matter what from the
7 dispensing data, so I just want to flag for the Court that I
8 think some of those concerns are a little bit over-amplified as
9 well.

10 JUDGE KUGLER: You have three more issues?

11 MR. STANOCH: I think we're --

12 JUDGE KUGLER: On page 8 you mention three more
13 things, but you're working them out?

14 MR. STANOCH: Yes, Your Honor. That was more by way
15 of update, where we're meeting, conferring numerous times,
16 we're going to continue to meet and confer on these issues.
17 We're hoping to narrow the issues.

18 We were originally planning for Special Master
19 Vanaskie with a letter briefing next week, and whatever's left
20 with those issues -- and a lot of it I think might just be
21 hopefully timing and contours of things specifically and it may
22 just be more of a thumbs up, thumbs down on which choice,
23 column A and column B, to choose from, Special Master Vanaskie,
24 versus something deeper, just for your own planning.

25 JUDGE VANASKIE: All right. Very well.

1 MR. STANOCH: And I'm sure Ms. Richer or Kapke will
2 correct me if they disagree.

3 MS. RICHER: We hope that's true, Your Honor.

4 MR. STANOCH: Thank you, Judges.

5 JUDGE KUGLER: Anything else from the plaintiffs?

6 MR. SLATER: Nothing, Your Honor.

7 JUDGE KUGLER: How about from defense?

8 MR. HARKINS: Nothing, Your Honor.

9 JUDGE KUGLER: Well, that was certainly interesting
10 news we started the meeting with today. Obviously we have
11 people in place to help you discuss settlement, but the
12 defendants may want to get on this train before it leaves the
13 station.

14 I get the sense that the plaintiffs are moving full
15 speed ahead on this and they're happy to talk to anybody who
16 wants to talk. But I'm going to keep moving full speed ahead,
17 we are going to get to a trial on this case, and my
18 anticipation is it's going to be within this calendar year.

19 So anyway, with that, thank you, everybody. We'll see
20 you -- we're still scheduled in July? How about Thursday, the
21 27th of July? Can we do that?

22 MR. OSTFELD: Your Honor, I'm so sorry, I -- if we're
23 going to be discussing class notice, it will probably be me,
24 and I have a class certification hearing that morning.

25 JUDGE KUGLER: Tuesday, the 25th?

1 MR. OSTFELD: We can do that.

2 JUDGE KUGLER: Tuesday, the 25th of July.

3 MR. SLATER: That works.

4 JUDGE KUGLER: Okay. We'll see you then. Enjoy the
5 summer.

6 (Matter adjourned at 1:55 p.m.)

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10 I certify that the foregoing is a correct transcript
11 from the record of proceedings in the above-entitled matter.

12

13 /S/ Sharon Ricci, RMR, CRR
14 Official Court Reporter

15 June 7, 2023
16 Date

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